Board of Inquiry File #93-0030

IN THE MATTER OF the Human Rights Code R.S.O. 1990, c. H.19

AND IN THE MATTER OF the complaint dated July 17, 1990 made by Dr. Shehla Burney, alleging discrimination against the University of Toronto an the Faculty of Education Search Committee, Ron Sheppard, Michael Fullan, Charles Lundy and Ann Millar

PRELIMINARY AWARD

BEFORE:

Paula Knopf - Chair

For the Commission	L. Steinberg, Counsel
For the Complainant	Charles Campbell, Counsel
For the Respondents	S. J. Page, Counsel

Hearings were held in Toronto on March 7, and 27, 1995

This Board of Inquiry was convened to hear the complaint of Dr. Shehla Burney alleging discrimination against the University of Toronto and the Faculty of Education Search Committee as well as several specified individuals. The hearing was scheduled to commence on its merits on March 7, 1995 with the Human Rights Commission, Dr. Burney and the University of Toronto as parties. On that day, counsel for the Human Rights Commission (the Commission) indicated to the Board of Inquiry that the Commission and the responding parties had reached a settlement of the outstanding issues between themselves. Consequently, counsel for the Commission indicated that the Commission would be withdrawing from the hearing as a result of that settlement. The Complainant, Dr. Burney, indicated at the same time that she was not a party to that settlement nor was she in agreement with the settlement that had been reached. Counsel for the Commission also stressed that its withdrawal should not be taken in any way to be prejudicial or adverse to Dr. Burney's right as a party to proceed on her own and have her complaint adjudicated before this Board of Inquiry. The respondent, University of Toronto, indicated its preparedness to proceed to have the complaint of Dr. Burney adjudicated against the respondent on its merits. However, the matter was adjourned on that day to enable Dr. Burney to obtain legal advice and/or retain counsel to represent her in this matter.

The matter resumed for hearing on March 27, 1995. At this time, Dr. Burney was represented by counsel for purposes of the presentation of a single procedural matter to this Board of Inquiry. This Interim Award deals with that procedural issue only. An oral ruling was issued to the parties on March 27, 1995. This Award confirms and amplifies the reasons for that oral ruling.

The procedural matter which the Board of Inquiry was called upon to deal with was the Complainant's request that, as a consequence of the Commission's alleged "improper behaviour", the Human Rights Commission be ordered to pay the legal costs of Dr. Burney presenting her complaint. This is an unusual request. The facts giving rise to the request need to be outlined. While the parties have some disagreement over the details concerning these facts, the fundamental and relevant facts are not in dispute and can be summarized as follows.

The complaint of Dr. Burney is dated July 17, 1990. This Board of Inquiry was appointed in November of 1993. The Commission initially was represented by

Commission Counsel, Sharon Ffolkes-Abrahams. However, in the fall of 1994, the Commission retained the firm of Koskie and Minsky to represent the Commission. Fiona Campbell of that firm was initially assigned to the case. In late 1994 responsibility for the file was transferred to Susan Philpott of that firm. Finally, in March of 1995, Larry Steinberg of the Koskie and Minsky firm took responsibility for the present procedural matters. Meanwhile, Dr. Burney also had counsel representing her interests at various stages in the processing of her complaint. Initially, she was being advised by Cathy Lace who had to withdraw her services as a result of a potential conflict of interest. Thereafter, the Complainant was represented by Dora Nipp up to January of 1995. However, after January of 1995, Ms. Nipp left the practice of law and the Complainant had no counsel of record to advise her or represent her as a separate party in the pending proceedings. She advises that she then relied upon the Commission and Commission counsel to represent her interests at the scheduled hearing. On the other hand, the Human Rights Commission and Commission counsel take the position that they did not consider Dr. Burney as their "client" at any relevant time.

In any event, the Complainant was out of the country from December 30, 1994 to February 21, 1995. She had been scheduled to return to Canada on February 10, 1995 and had advised Ms. Philpott of this fact. During the time of the Complainant's absence, the Complainant and Ms. Philpott had been able to communicate via fax whenever necessary. Between the 10th and the 21st of February, the Complainant was ill and unable to return to Canada. Ms. Philpott did not know where Dr. Burney was. Therefore, there was no successful communications between the Complainant and Ms. Philpott between February 10 and 21, 1995.

It must also be noted that in the fall of 1994, during a pre-hearing conference, the possibility of settlement had been discussed between all the parties and their representatives. The early discussions were not fruitful. However, on or about February 15, 1995, counsel for the Commission and counsel for the respondent University of Toronto commenced more successful settlement negotiations. These discussions came to a head when an oral understanding was reached on or about February 22nd. This was made more formal by way of a written offer of settlement sent by the University of Toronto to counsel for the Human Rights Commission on February 23rd. On February 24th, the Commission instructed its counsel to advise the University that the written offer of settlement appeared to be acceptable to the Commission. However, it was

understood between the Commission and the University of Toronto that the Commission would have to ratify the terms of the settlement.

There is no dispute that Dr. Burney was not a party to the settlement discussions nor did she find the terms of the settlement acceptable to her. There is some dispute about when she was informed of the potential settlement. Counsel for the Commission asserts that Dr. Burney was apprised of the discussions on February 21st. Dr. Burney acknowledges a telephone conversation on that day when she phoned Ms. Philpott from the airport to advise of her return to Canada. But Dr. Burney says she was not told about the discussions or the agreement until a meeting with Ms. Philpott on February 24th. Nothing turns on this factual difference for purposes of the motion before me at this time. What is clear is that by February 24th, Ms. Philpott, as counsel for the Commission, had advised the Complainant that there was an oral agreement between the Commission and the University of Toronto that the Commission considered binding. Further, counsel for the Commission advised Dr. Burney of her right to proceed with her complainant against the University and suggested that Dr. Burney seek independent legal advice. On or about February 27th, the Commission advised Dr. Burney that it had accepted the oral settlement and considered it binding as between the Commission and the University of Toronto. Dr. Burney was upset by the terms of the settlement because she felt that they were a capitulation from positions taken earlier by the Commission at the pre-hearing conference. Counsel for all three interests quite properly presented no evidence about the terms of the settlement discussions or the terms of the settlement itself. However, it is undisputed that the details of the final settlement were different than the details which had been discussed in November. The extent of the differences are not relevant to this issue. It is also clear that Dr. Burney had no input into the final terms of the settlement between the Commission and the University.

In a conversation on February 28th, the Commission advised Dr. Burney that it would be seeking an adjournment of dates of the scheduled hearing commencing March 7, in order to be able to ratify the proposed settlement. Dr. Burney indicated she was opposed to any adjournments. She also understood that there was a need for ratification of the settlement. She believed that there was some possibility that the Commission may not ratify the proposal.

On Friday March 3rd, the Commission ratified the proposed settlement and advised Dr. Burney of this fact late that afternoon. Between March 3 and 7 the

Complainant tried to obtain legal advice regarding the Commission's conduct and to obtain representation for the presentation of her case. While she was able to obtain some advice, she appeared on March 7, 1995 for the first day of the Board of Inquiry on her own behalf. On that day, the matter was adjourned to enable her to have more time to properly retain and instruct counsel.

The issue to be determined in this decision is whether the Human Rights Commission has conducted itself in such a way as to warrant an order requiring it to pay the legal costs of the Complainant so that she may proceed with the presentation of her complaint.

The Arguments of the Parties

Counsel for Dr. Burney argued that under Section 23 of the *Statutory Powers Procedure Act*, this Board of Inquiry has the jurisdiction and the discretion to make any order necessary to ensure that there is not an abuse of these proceedings. It was argued that because the issues and evidence in this case are so important and complex, the only way to prevent a hearing that would be a "shambles and a discredit to a good case" would be to order that the Human Rights Commission pay Dr. Burney's costs of retaining a lawyer to represent her interests throughout these proceedings. Essentially, it was argued that there has been an abuse of process here and that the Board of Inquiry has the jurisdiction to remedy that by way of an order of costs as against the Commission. In support of this argument, counsel for the Complainant relied upon the *Human Rights Code* extensively. It was argued that Section 43 of the Code demands that there can be no binding settlement unless it is signed by all the parties to the proceedings. By virtue of Section 39(2)(b) it was argued that since the Complainant is a separate party, the absence of the agreement of the Complainant means that there should be considered to be no settlement in this matter. Further, drawing upon the Commission's broad investigative powers, its duty to attempt to achieve a settlement prior to appointing a Board of Inquiry and its unfettered discretion as to whether or not to request the appointment of a Board of Inquiry, it was argued that once the Board of Inquiry is appointed, the Commission cannot settle the case for any reason without the consent of the complainant. It was suggested that any concerns the Commission may have about proceeding with an unreasonable complaint or complainant can be dealt with prior to the decision to appoint a Board of Inquiry. Thereafter, it was argued that the Commission's duties under Section 39(2) are mandatory and demand that the Commission shall have carriage of the complaint through

to a tripartite agreement or an adjudicative resolution. It was further argued that there is no division recognized in the Code between the interests of the complainant and the public interest so that the Commission is obligated to take carriage of the complaint and proceed with it in concert with the interests of the complainant.

Further it was argued that the *Human Rights Code* is intended to establish a scheme whereby the Commission will have carriage of complaints and individuals will not be vested with the responsibility of presenting evidence or funding the litigation. It was argued that this is a fundamental concept in the Code because of the recognition that human rights cases are complex and expensive to present. It was argued that the Code puts that responsibility for the legal management of a case on the Human Rights Commission under Section 39(2)(a). Acknowledging that in some cases complainants' counsel do participate and may even take over the lead in presenting the cases, the fact that this possibility exists was argued to be irrelevant to the statutory duty on the Commission to take carriage of the case. Consequently, it was argued that the Commission does not have the statutory right to absent itself from a hearing once a Board of Inquiry has been established. It was strenuously argued that in the case at hand, the Human Rights Commission has betrayed its obligation under the Code to Dr. Burney and left her in an untenable position. It was argued that unless the remedial relief which is being requested is granted to Dr. Burney, the hearing will be extremely difficult for everyone. It is argued that the Commission has essentially prejudiced her case by entering into a settlement with the University of Toronto. It was further argued that Dr. Burney has been prejudiced by the fact that she did not become aware of the settlement between the Commission and the Respondents until it was too late for her to redeem the situation by retaining counsel who could represent her on the dates scheduled for the hearing. Counsel for Dr. Burney called the behaviour of the Commission an "ambush of a complaint". It was said that the Complainant was put in the impossible situation of having to choose to proceed on the dates scheduled for the hearing without the benefit of counsel or accepting that the matter be adjourned for several months. From the perspective of the Complainant, both options seemed "equally unacceptable."

Arguing by analogy, counsel for Dr. Burney submitted that the situation ought to be considered to be akin to the unfair labour practice provisions under the Ontario *Labour Relations Act* where a union, which has been found to be in breach of its duty of fair representation of an individual grievor, may be subject to an order requiring the Union to retain and compensate counsel of the grievor's choice for the presentation of

the grievance. The following cases were cited in support: *Schneider Employees Association,* [1995] (as yet unreported), *Canadian Union of Public Employees, Local 2327,* [1981] OLRB Rep. June, 623, *The United Steelworkers of America,* [1992] OLRB Rep. July 820. This Board of Inquiry was asked to seize its jurisdiction as "the master of its process" to do something to remedy the situation of the Complainant who is at odds with the Commission and wants to pursue the case but needs assistance with regards to funding. It was argued that unless the Complainant has counsel she will have great difficulty presenting her case and the Board of Inquiry will have a very difficult job managing the hearing to ensure that it is fair. The specific remedy requested was that money be made available by the Commission to the Complainant for her to pay the legal fees of a counsel to either give her advice to assist her at the hearing or to represent her at the hearing itself. While it was made clear that Dr. Burney would like an order setting aside the settlement between the Commission and the University of Toronto, counsel for Dr. Burney indicated, quite properly, that this Board of Inquiry does not have the jurisdiction to make such an order.

In response to this argument, counsel for the Human Rights Commission began by asserting that the Board of Inquiry does not have the jurisdiction to make the order that Dr. Burney is seeking. It was argued that the *Human Rights Code* has only one provision whereby an order of costs can be made, namely Section 41(4). It was said that this limits the jurisdiction to order costs against the Commission and sets out defined circumstances which are entirely different than the factual ones before us at this time. Consequently, it was argued that there was no jurisdiction to make the order requested. In the alternative, if there is such jurisdiction, it was argued that this is not an appropriate case for the exercise of such jurisdiction. First it was said that the facts do not support a conclusion that there was an abuse of process. It was stressed that the *Human Rights Code* sets up a system whereby the Commission and the Complainant are both considered as independent parties to proceedings such as this. The Commission has a statutory mandate which may, at times, be different than that of the complainant. Relying on Section 29 of the Code, it was argued that those functions and responsibilities may result in interests which are divergent from that of the complainant. Hence, the Code has defined that the parties to a proceeding before a Board of Inquiry will include the Commission and the complainant as separate parties so that their separate interests may be maintained. Further, it was stressed that if the Commission can settle a matter with a respondent in a way that meets its statutory and public mandate, this does not prevent the complainant from proceeding with the Board of Inquiry to present and prove its case.

This is why the Commission is taking the position that it cannot and would not seek to prevent Dr. Burney from proceeding with her case. Further, responding to the argument that the responsibility under Section 39(2) of the Code to have carriage of a case demands that the Commission proceed through to a settlement involving all the parties or through to an adjudicated end, counsel for the Commission argued that if this were to be the case the Commission would have no option but to withdraw a complaint if it did not agree with the interests of the complainant. Counsel for the Commission indicated that it would not be prudent to be forced to make such a choice. Further, it was argued that there is no warrant or support in the Code for the proposition that once a Board of Inquiry is constituted it must proceed through to adjudication without unanimous concurrence to a settlement. Given the complexity of litigation and the dynamics of the settlement process, it was said to be a dangerous position to force the Commission to proceed through to litigation in the event that a complainant may become completely unreasonable about the presentation or resolution of its case. Stressing that that was not the situation in the case at hand, counsel for the Commission argued that if the present remedy was granted, a dangerous precedent would be set. Further, it was argued that the right and duty to have carriage of a complaint must include the right to conduct litigation freely which would include the right to withdraw and settle on behalf of one of the parties.

Turning to the facts of the case, counsel for the Commission argued that there has been no abuse of process established. First, the Board of Inquiry was reminded that the Complainant was involved in the first "trial balloons" being floated with regard to settlement in the November discussions. Thereafter, it was conceded that the Complainant was not involved in the February settlement discussions. However, the position of the Commission was that those discussions did not require the Complainant's involvement because it was simply a matter of negotiations between the Commission and the University of Toronto at that point. Had the discussions broken down, there would have been noting to report to Dr. Burney. But once they were able to reach an arrangement, its terms were discussed with Dr. Burney. The position of the Commission was that it had no obligation to take any possible settlement discussions to the Complainant until the Commission itself was satisfied with the terms of a settlement. That was what was done in this case on or before February 24th. It was argued that once Dr. Burney was advised she had ample time to retain counsel and was advised of the advantages of doing so. Acknowledging that the time periods may appear to have been short, it was argued that the remedy for that situation would be an adjournment. However, it was stressed that it was Dr. Burney herself who objected to an adjournment which the Commission was seeking. It was

argued that Dr. Burney has the choice of accepting an adjournment of the proceedings in order to retain counsel or to present the case on her own on the dates scheduled. However, it was said to be a "huge leap" to say that the Commission should have to pay any possible legal costs of presenting this case in these circumstances. It was said there is no evidence as to whether Dr. Burney can afford to pay a lawyer or not and that there has been no assurances given that counsel will even necessarily be retained. Thus, it was said that the remedy being sought for the alleged breach of process does not fit the situation before me. It was said that Dr. Burney was essentially asking the Human Rights Commission to act as a "legal aid service" or funding source for the presentation of her complaint.

Further, counsel for the Commission took strong objection to counsel for Dr. Burney's characterization of the Commission's conduct as amounting to an "ambush" of these proceedings. Counsel for the Commission stated that the Commission understood Dr. Burney's frustration under the circumstances, however it was stressed that the Commission was simply exercising its statutory mandate as it was required and entitled to do.

Responding to the argument that there ought to be an analogy drawn between the circumstances of this case and Section 69 of the *Labour Relations Act,* counsel for the Commission argued that this situation is totally distinguishable because under the *Labour Relations Act,* an individual grievor never has the right of carriage of a grievance and needs the remedial authority of the Ontario Labour Relations Board in order to ensure that a case can be presented. However, under the *Human Rights Code* the Complainant is a separate party to a proceeding and therefore has different rights, responsibilities and duties which include the right to proceed on their own with a complaint if they so choose. Finally, relying on Driedger on the *Construction of Statutes,* it was argued that the word "shall" in Section 39(2) is not necessarily mandatory and should never be read to mean that once a Board of Inquiry is constituted that it must be carried through to the end with the Commission as an unwilling party.

Counsel referred to the following authorities: *Karumanchiri v. Ontario (Liquor Control Board)*, 8 CHRR D/4076, Driedger, *Construction of Statutes,* Butterworths, Toronto 1992, Keene, Judith, *Human Rights in Ontario,* 2nd Edition, Carswell, *Khela v. J. I. Case Canada,* OHRC decision dated April 15, 1994, Constance Backhouse and *Lorna Richards v. Lorne Waisglass,* OHRC decision, *1994.*

Counsel for the University of Toronto also participated in this motion, to a limited extent. First, it was argued that absent any specific statutory authority to award costs such as are being requested in this case, a Board of Inquiry has no authority to do so. Reliance was placed on the Divisional Court's endorsement in the *Karumanchiri* decision, *supra.* Further, counsel for the University characterized the Complainant's request to be essentially seeking a declaration that there would be an abuse of process if her case were not properly funded or if she had to proceed without counsel. Because the facts the Complainant is relying upon to support this argument occurred outside of the hearing process, it was argued that it is inappropriate to find an abuse of the process under such ircumstances. Further, it was argued that it is improper to find an abuse of process on the facts before me because any problems the complainant is facing can be cured by way of an adjournment. Further, it was stressed that there is no evidence before me that the complainant requires the remedial order being requested in terms of financial need. Further, it was argued that part of the Complainant's concerns about having to proceed without counsel are the direct result of her insistence on proceeding into the merits of the case on March 29th despite the Commission's and the University's desire and/or willingness to adjourn the matter to some reasonable time in the future.

Further, it was stressed that the Code and all its provisions recognize that there are two distinct interests to be presented at a hearing. First there is the broader public interest which the Commission represents. Second there is the private interest of the complainant. The fact that the complainant and the Commission are given separate legal status under the Code was said to reflect the recognition of the two distinct interests. Counsel for the University relied upon the many cases that support the proposition that either party can settle its interest at any time and that the matter can proceed with whatever parties are left to litigate the remaining issues. It was argued that if the Complainant's request was taken to its logical conclusion and if all parties were required to sign a settlement in order to end a proceeding, either a complainant or the Commission would be able to hold the proceedings up to ransom. It was said that the scheme of the Code is designed to ensure that neither a complainant nor the Commission can have *de facto* control over the process and its conclusion. In conclusion, counsel for the University submitted that the Complainant was asking for extraordinary discretionary relief that should be only exercised as a matter of discretion in the most extraordinary situation such as where the purposes of the Code were not being met. It was said that on the facts of the case the statutory mandate of the Commission was being fulfilled and the

statutory rights of the Complainant would be allowed to be asserted. Accordingly, it was said that the relief being requested ought not to be granted as a matter of discretion quite apart from the argument that there was no statutory jurisdiction to award the relief being sought.

By way of reply it was conceded that there is no evidence of Dr. Burney's inability to pay for a lawyer on her own. However, it was stressed that the design of the statutory scheme in the Code is a recognition that complainants will not be able to present human rights complaints on their own. It was argued that the Commission was given carriage of cases in recognition of the reality that only the very rich would be able to afford to bring human rights cases forward given the complexity and the rigorous requirements of litigation. It was argued that unless the Human Rights Commission either presents cases or provides funding for complainants, human rights complaints will be beyond the means of all but the very rich. In the conclusion of his very able argument, counsel for Dr. Burney stressed that under Section 29 and Part IV of the Code there is no divergence of issues between the complainant and the Human Rights Commission.

The Decision

I must begin by commenting upon the fact that all parties have expressed a real sense of frustration over these proceedings, especially Dr. Burney and the University of Toronto. The delays in the processing of this case and in the convening a hearing are a credit to no one. The delays have had negative effects on all parties. The uncertainties about whether matters are proceeding has inconvenienced and damaged everybody. One can only hope that a situation such as this will not arise again.

But the first question to address is one of jurisdiction. One must determine whether a Board of Inquiry has jurisdiction to order the Human Rights Commission to pay the costs of a complainant retaining a lawyer to assist in the presentation of a case before a Board of Inquiry in order to prevent abuse of process. Section 23 of the *Statutory Powers Procedures Act* provides:

> (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Section 23 is very broad. It is clearly directed to enable tribunals to prevent abuses of process. The remedial authority is presumably as broad as the situation requires. However to trigger the remedial award, abuse must be established on the part of the party targeted in the order. Therefore, one must first ask whether there has been any abuse on the part of the Human Rights Commission established by the evidence presented.

In this motion, counsel for all parties have carefully and properly insulated this Board of Inquiry from the substance and the details of the settlement discussions between the University of Toronto and the Human Rights Commission. That was necessary to ensure that this tribunal could proceed to adjudicate the merits of the case without any knowledge of the contents of the settlement between the University and the Commission. Therefore, the question of "abuse" does not involve the issue of the terms of the settlement.

The facts outlined above do indicate that as the parties approached the pending hearing day of March 7th, the common and predictable flurry of settlement activity occurred as negotiations began in earnest on or about February 15th. Those discussions ultimately culminated in a meeting of minds between the University and the Commission. Dr. Burney was not a party to any of this. It is easy to imagine how matters could have been dealt with differently with the benefit of hindsight. However, since no one is asking this Board of Inquiry to set aside the settlement reached between the Commission and the University and since Mr. Campbell, on behalf of Dr. Burney, agrees that this Board of Inquiry does not have jurisdiction to force the Human Rights Commission to proceed to present the case on behalf of Dr. Burney, I must conclude that it would be inappropriate to render an opinion about the conduct of the Human Rights Commission concerning its settlement with the University of Toronto. Without knowing the details of the settlement, the details of the settlement discussions and the precise reasons why Dr. Burney was involved or not involved in the discussions, there is simply not enough evidence before me to determine whether the Commission should be censured for the way it acted. Further, putting that evidence before this Board of Inquiry would inevitably result in this adjudicator being tainted by the knowledge of those discussions and thereafter unable to deal with the merits of the case. Therefore, I decline to consider and/or conclude whether the Human Rights Commission acted improperly towards Dr. Burney under these circumstances. Further, I take this position so that Dr. Burney is free to consider her rights *vis-a-vis* the Human Rights Commission in another forum, separate and apart from these proceedings if she chooses to do so.

Suffice to say that on the properly limited facts before this Board of Inquiry, but which are all very necessary for me to decide this issue, I have not been able to conclude that there was an abuse of process that would trigger the operation of any remedial authority under Section 23 of the *Statutory Powers Procedure Act.*

Even if abuse of process was established against the Human Rights Commission on the facts before me, I would still have to ask whether there was jurisdiction to order the compensation the Complainant pursues under Section 23 of the *Statutory Powers Procedure Act.* Having asked that question I must conclude again that there would be no jurisdiction to do so. Section 23 of the *Statutory Powers Procedure Act* is broad and general. In contrast, the *Human Rights Code* deals specifically with a Board of Inquiry's jurisdiction to make orders concerning compensation for costs. Section 41(4) of the Code provides:

> Where, upon dismissing a complaint, the board of inquiry finds that,
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> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
>
> (b) in the particular circumstances undue hardship was caused to the person complained against,
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> the board of inquiry may order the Commission to pay the person complained against such costs as are fixed by the board.

That Section requires the dismissal of a complaint in specific circumstances in order for a Board of Inquiry to assert its discretion to award costs against the Commission in favour of the person who was complained against. Only under those very limited circumstances does a Board of Inquiry have authority and jurisdiction to award costs against the Human Rights Commission. Such circumstances are not at play in this case where the hearing on the merits has not yet begun and where the dispute at this stage is between the Complainant and the Commission, rather than against the Respondents.

No other authority to award costs or legal fees exists in the Code except perhaps under Section 41 as found in the case of *Karumanchiri v. Ontario (Liquor*

Control Board), supra. But again, this is only triggered by a finding, after a hearing, that the rights of the complainant under Part I had been infringed by a party to the proceedings. And again, there has been no such inquiry nor any such finding on the merits. This section does not grant the authority to make the order the Complainant seeks. Section 41(1) reads as follows:

> 41. (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

No authorities were cited, nor do any appear to be available, to say that an abuse of process situation is created if the Complainant is not funded especially where the funds are being sought against an original party to the proceedings which initially shared corresponding interests with the Complainant. If such a finding were possible, the separate party status and rights of individual complainants or plaintiffs in civil and administrative litigation would be hamstrung by the resources of each other. One party's ability to withdraw from and/or settle its issues with the respondents would be dictated by the question of whether the original co-litigants were financially or practically able to proceed with the litigation on their own. Such a serious result would impede, rather than advance the objective of access to justice because litigants would be at jeopardy *vis-a-vis* their co-litigants as well as the parties who initially appeared to be opposed in interest. Consequently, it is difficult to accept that the *Statutory Powers Procedure Act* could vest a tribunal with authority to order a co-litigant who has settled its interest against the opposite party to then bear the responsibility for the legal fees of the remaining co-litigants. This is especially so in light of the limited and specific jurisdiction to award costs against the Human Rights Commissions in the Code. Therefore, it must be concluded that

there is either no jurisdiction to make the order being sought by the Complainant in this matter or that such an order would be contrary to the interests of justice.

If I am wrong about this jurisdictional question and if Section 23 of the *Statutory Powers Procedure Act* does give this tribunal the authority or jurisdiction to exercise the discretion to award costs to the complainant in circumstances such as this, then it must be asked whether this is a proper situation in which to exercise such a discretion. In considering that question, the answer must again be that this is not an appropriate case for the exercise of such a discretion. First of all, the remedy that is being requested is both unusual and extraordinary. Under those circumstances, it would seem that the order ought not to be granted unless it would have the effect of remedying a very difficult situation, where no other solution is practical or available, and where such an order is necessary to ensure a just process. The facts before me do not support such a conclusion. The submissions reveal that the Commission is being asked to assume financial responsibility for counsel for the Complainant in order to achieve two purposes. First, to allow the case to begin on its merits without any further delay. Secondly, to ensure that the case is properly managed by competent counsel. However, the facts also reveal that even if the order were to be granted, no counsel is available to commence representation of Dr. Burney on March 29th or indeed for any of the multiple days scheduled for the merits of this case in March and April of this year.

The facts reveal that the real problems Dr. Burney had to face once she was made aware of the settlement between the Commission and the respondent University was that she did not have sufficient time to retain a competent counsel who could appear at the hearing on the scheduled dates. This has caused her great inconvenience, personal hardship and frustration. However, the order that she is seeking will not remedy that situation. The only remedy for the timing problem is time itself. By adjourning the matter some months in the future which are sufficient to enable Dr. Burney to retain competent counsel who is available on those dates, the major difficulty in obtaining representation will be cured.

This Board of Inquiry is not insensitive to the practical problems of funding complex litigation such as this case appears to involve. I have great sympathy with Mr. Campbell's submissions that the Code is designed to assist complainants to bring cases forward so that more than the privileged and the rich will have access to remedies under the *Human Rights Code.* However, essentially this Board of Inquiry is being asked to take

judicial notice that litigation is expensive and use this as the basis to exercise an extraordinary discretion to order the Commission to assist in the funding of the retention of counsel. While a tribunal certainly benefits from the assistance and the management a good lawyer can bring to the presentation of a case, this tribunal is not prepared to say that legal representation is necessary in every proceeding in order to ensure that there is no abuse of process. Therefore, I am not persuaded that if there is a discretion to make the order that the Complainant seeks that this is an appropriate case to do so.

Further, this case has to be distinguished from the situations cited before the Ontario Labour Relations Board, *supra.* Remedial orders made under Section 69 of the *Labour Relations Act* granting a grievor the right to retain counsel of his choice who will be paid for by a union are based upon a finding, at the conclusion of the case, that the union has failed to meet its statutory duty of fair representation towards the grievor and has not or will not be able to represent the grievor properly in the future arbitration. Further, under the *Labour Relations Act,* the grievor has no independent right to proceed against an employer without the Union's support. The remedial orders made in those circumstances are necessary to ensure that those individuals have access to an adjudicative process. That is not the situation before us in this case. Here, there is no question that Dr. Burney can pursue her case against the University of Toronto. The *Khela* and *Richards* cases above illustrate the separate rights of the individual complainants and the Commission to pursue litigation, even when the Commission has decided to withdraw. While it was admitted that the reference to the *Labour Relations Act* was made by way of analogy, the analogy is not a tight one. It does not persuade me that the remedy being sought is appropriate or necessary.

Finally, as a matter of discretion, the order the Complainant is seeking would have grave consequences on the processing of human rights complaints. If the Complainant's argument was accepted or correct, it would mean that once a Board of Inquiry is established, the Human Rights Commission would be forced to proceed through to an adjudication on the merits or achieve a settlement which is completely agreed upon by the complainant. While this may, at first blush, seem to be a desirable result, it could also have the adverse effect of making the Commission far more reluctant about constituting Boards of Inquiry. Further, it would effectively erase the separate party status which is protected under Section 39 of the Code. It could inspire the Commission to withdraw meritorious complaints rather than incur the further risk of liability for the complainants' costs. Finally, it would make the Commission ransomed to the complainants

and the complainants ransomed to the Commission in terms of the negotiation of settlements with the respondents. Neither is desirable. All these issues raise grave policy concerns and implications about the argument being presented on behalf of Dr. Burney at this time.

When all these factors are taken together, it leads this Board of Inquiry to the strong conviction that even if there is jurisdiction to award costs against the Commission in favour of Dr. Burney to enable her to fund this litigation, I would not do so under the circumstances of this case. This was indicated to the parties orally at the hearing on March 27, 1995. Thereafter, counsel for the parties and the Board of Inquiry engaged in discussions to determine the most appropriate way to proceed with this matter. On the agreement of the parties the matter was adjourned until March 31st to enable Dr. Burney and the University of Toronto to determine mutually convenient dates for the resumption of these proceedings that will allow for Dr. Burney to retain counsel to advise or represent her in the future proceedings.

In that March 31, 1995 telephone conference, dates for the resumption of proceedings were agreed upon. Accordingly, the Board of Inquiry orders this matter adjourned until the following dates: September 13, 14, 18, 19, 20
October 4
November 17
December 13, 15, 18, 19

DATED at Toronto, Ontario, this 25th day of April, 1995.

Chair
Board of Inquiry